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Sally Azevedo

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August 22, 2006

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

UG 25 7006 BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant: Michael L.F. Chan

PATENT APPLICATION

Serial No: 10/608,054

Group Art Unit: 3725

Filed: June 27, 2003

Examiner: B.B. Miller

Confirmation No.: 7895

Atty. Docket No.: TRA-007

For: GIFT DISPLAY BOX

APPLICANTS' - APPELLANTS' OPENING BRIEF

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

UG 25 2006

Applicant: Michael L.F. Chan PATENT APPLICATION

Serial No: 10/608,054 Group Art Unit: 3725

Filed: June 27, 2003 Examiner: B.B. Miller

Confirmation No.: 7895 Atty. Docket No.: TRA-007

For: GIFT DISPLAY BOX

### Introduction

This is an appeal of the final rejection of claim 19 of the above-identified patent application. The final rejection was mailed on February 22, 2006. A first Advisory Action was mailed on June 26, 2006 and a second Advisory Action was mailed on July 10, 2006. As required under 37 C.F.R. § 41.37 (a), this brief is filed within two months of the date of filing of the Notice of Appeal (June 23, 2006).



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# Real Party in Interest

The real party of interest is Michael L.F. Chan.

#### Related Appeals and Interferences

There are no prior or pending appeals, judicial proceedings, interferences for commonly-owned applications having common subject matter or claim to a common priority application know to either Appellant or the real party in interest which may be related to, directly effect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

# Status of Claims

Claim 19 was finally rejected in the Office action of February 22 , 2006 and that rejection is being appealed herewith.

### Status of Amendments

An amendment was filed on July 25, 2006 to amend claim 19 to correct an informality identified by the Examiner in an advisory action dated July 10, 2006 and to present the claim in better form for consideration on appeal. As far as Appellant is aware, the Amendment has not yet been formally entered although part of the record as indicated by the PTO electronic docket. Claim 19, as presented here, reflects the amendment.

### Summary of Claimed Subject Matter

Appellant's independent claim 19 recites a device for display of a gift that is suitable for mailing. The device comprises "an inner box of rectangular cross section" "having dimensions for accommodating a gift therein" and "having a transparent wall through which said gift is visible..." Also, the device includes, "an outer box... having dimensions for snug nesting of the inner box" and the outer box "having a cutout region in the one of the opposed top and bottom sections through which the inner box is visible." Thus, the gift displayed in the inner box is visible when the inner box is nested within the outer box.

# Grounds of Rejection to Be Reviewed on Appeal

The following are the grounds of rejection to be reviewed in this appeal:

1. Is claim 19 patentable under 35 U.S.C. § 102(b) over U.S. Patent No. 1,860,586 to McIlhenney?

#### <u>Arguments</u>

# I. <u>Claim 19 is Patentable Under 35 U.S.C. § 102 (b) Because</u> McIlhenney Fails to Teach Each Element of this Claim

Claim 19 is not anticipated by McIlhenney. In order to anticipate a claim, a reference must teach all of the elements of the claim. See <a href="Verdegaal Bros.">Verdegaal Bros.</a>, Inc. v. Union Oil Co., 814 F. 2d 628, 631 (Fed. Cir. 1987). The reference must show the claimed invention "in as complete detail as is contained in the patent claim" in order to anticipate the claimed invention. <a href="Richardson v. Suzuki Motor Co.">Richardson v. Suzuki Motor Co.</a>, Ltd., 868 F.2d 1226, 1236 (Fed. Cir. 1989). McIlhenney fails to teach all of the elements of Appellant's claim 19 as in complete detail as contained in its claim.

Therefore, the claims are not anticipated and are novel.

# A. McIlhenney Fails to Teach all the Elements of Appellant's Claim 19

McIlhenney fails to anticipate Appellant's claim 19 because it fails to teach all elements of Appellant's claim 19. In the Office action of February 22, 2006, the Examiner erroneously asserted that, "[t]he device of McIlhenney reads on the structural limitation of the claims including an inner box (the combination of 11 and 12)...." Office action, at 2. McIlhenney does not teach the inner box as claimed in claim 19.

Therefore, McIlhenney fails to anticipate Appellant's claim 19.

Specifically, McIhenney fails to teach Appellant's claimed element of "an inner box of rectangular cross section with opposed top and bottom sections...", as recited in claim 19. Instead, McIlhenney recites, "[t]he candy or other contents of the box will be packed in a tubular member 12...." McIlhenney, col. 2, lines 76-77. The Examiner has erroneously asserted that the tubular member 12 of McIlhenney is an inner box, as recited in Appellant's claim 19.

A "tubular member" is not a box. Oxford's Compact English Dictionary Online defines a box as "a container with a flat base and sides and a lid." McIlhenney's "tubular member" suggests the 3-sided cardboard dividers found in confectioner's samplers. Figures 1-3 and 6-8 of McIlhenney clearly shown an outer box, but do not disclose any details of the "tubular member." McIlhenney does not teach, or even suggest, that the tubular member 12 has a flat base, sides, and a lid, much less "an inner box of rectangular cross section with opposed top and bottom sections..." as recited in Appellant's claim 19. As McIlhenney does not teach this element of Appellant's claim 19, McIlhenney fails to anticipate the claimed invention.

Further, McIlhenney fails to teach Appellant's claimed element of "said inner box having a transparent wall through which said gift is visible", as recited in claim 19 (emphasis

added). McIlhenney recites, "[t]he candy or other contents of the box will be packed in a tubular member 12 and entirely wrapped and sealed in a transparent paper or sheet cellophane 11 as illustrated in Figure 6." McIlhenney, col. 2, lines 76-80. The transparent paper or sheet cellophane 11 of McIlhenney is not a transparent wall of an inner box recited in Appellant's claim 19. McIlhenney's "tubular member" "wrapped and sealed in a transparent paper or sheet cellophane" does not read on Appellant's "transparent wall." Instead, transparent paper or sheet cellophane is a covering of the tubular member 12.

For the sake of argument, even if the tubular member 12 of McIlhenney were considered to be an inner box, McIlhenney does not teach or even suggest that the inner box has a "transparent wall." It only discloses a transparent paper or sheet cellophane which is a covering of tubular member 12, not a transparent wall of an inner box.

To further emphasize the difference between transparent paper or sheet cellophane and a transparent, inner box wall, Appellant submits that transparent paper or sheet cellophane may not be removed in the same manner as a box top; once removed, it must be resealed by heat, tape, or glue. In contrast, a box with a transparent wall may be opened, the contents removed and replaced, then closed without glue or tape. As McIlhenney does not teach an "inner box having a transparent wall," (emphasis

added) as required by Appellant's claim 19, McIlhenney does not anticipate claim 19.

# B. <u>Appellant's Product, Based on the Claimed Invention, has</u> Achieved Commercial Success

Appellant submitted the Declaration of Michael L.F.

Chan Under PTO Rule 1.132 ("Declaration") in response to the

Office action dated October 11, 2005 in the event that an

obviousness rejection was to be made subsequent to Appellant's

response. Though the Examiner never made an obviousness

rejection, the Examiner responded to the Declaration in the

Advisory Action Before Filing of an Appeal Brief dated July 10,

2006 and in the Advisory Action Before Filing of an Appeal Brief

dated June 26, 2006. In order to provide a thorough response to

the Advisory Actions, Appellant, without conceding that an

obviousness rejection was even made, responds to the Examiners

assertion as follows.

In responding to Appellant's submission of the Declaration, the Examiner stated that, "an Applicant who is acceding commercial success to support its contention of nonobviousness bears the burden of proof of establishing a nexus between the claimed invention and the evidence of commercial success." Advisory Action Before the Filing of an Appeal Brief, dated July 10, 2006. Further, the Examiner, citing a Federal

Circuit case, stated that "[t]he term 'nexus' designates a factually and legally sufficient connection between the evidence of commercial success and the claimed invention so that the evidence is of probative value in the determination of nonobviousness." Advisory Action Before the Filing of an Appeal Brief, dated July 10, 2006 (citing Demaco Corp. v. F. Von Langsdoe Licensing Ltd., 851 F.2d 1387 (Fed Cir. 1988)).

In response, Appellant submits that Demaco states, "[a] prima facie case of nexus is generally made out when the patentee shows both that there is commercial success, and the thing (product or method) that is commercially successful is the invention disclosed and claimed in the patent." Demaco at 1392. First, Appellant submits that Appellant's Declaration indicates a showing of commercial success. As stated in the Declaration, Appellant sold approximately 10,000 gift display boxes since 2003, thus indicating commercial success. Further, Appellant submits that the only advertising for the claimed product was the order catalogue thus indicating the great likelihood that marketing and advertisements are not responsible for the commercial success and instead indicating that the merits of the product itself are responsible for the commercial success. Second, Appellant submits that its commercially successful product is Appellant's claimed invention disclosed in its patent application. Appellant's claim recites, "an inner box of

rectangular cross section with opposed top and bottom sections having dimensions for accommodating a gift therein, said inner box having a transparent wall through which said gift is visible, an outer box with opposed top and bottom sections having dimensions for snug nesting of the inner box by ingress through an end of the outer box between the top and bottom sections, the outer box having a cutout region in the one of the opposed top and bottom sections through which the inner box is visible." Appellant submits that all of these elements are present in the product displayed in the order catalogue submitted with the Declaration. Thus, Appellant submits that the commercially successful product shown in the order catalogue is Appellant's claimed invention disclosed in its patent application. Appellant submits that it has met its burden of proof as it has established a nexus between the claimed invention and the evidence of commercial success.

Accordingly, for at least the reasons submitted above, Appellant submits that its claimed product is commercially successful.

### Claims Appendix

19. A device for display of a gift item suitable for mailing comprising,

an inner box of rectangular cross section with opposed top and bottom sections having dimensions for accommodating a gift therein, said inner box having a transparent wall through which said gift is visible,

an outer box with opposed top and bottom sections having dimensions for snug nesting of the inner box by ingress through an end of the outer box between the top and bottom sections, the outer box having a cutout region in the one of the opposed top and bottom sections through which the inner box is visible.

# Evidence Appendix

1. Declaration of Michael L.F. Chan Under PTO Rule 1.132

# Related Proceedings Appendix

None

#### Relief Sought

Appellant believes that the pending claim rejected by the Examiner defines a patentable invention that is novel, and even non obvious, over the cited reference for at least the reasons set forth above. Accordingly, Appellant respectfully requests that the Examiner's rejection be reversed.

#### CERTIFICATE OF MAILING

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, Alexandria, VA 22313-1450.

Signed:	alles anuedo	
Typed Name:	Sally Azevedo	•

Date: August 22, 2006

Respectfully submitted,

Thomas Schneck Reg. No. 24,518

Schneck & Schneck
P.O. Box 2-E
San Jose, CA 95109-0005

(408) 297-9733

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

olicant: Michael L.F. Chan

PATENT APPLICATION

Serial No.: 10/608,054

Group Art Unit: 3725

Filed: June 27, 2003

Examiner: Bena B. Miller

Confirmation No.: 7895

Attorney Docket No.: TRA-007

For: GIFT DISPLAY BOX

# Declaration of Michael L.F. Chan Under PTO Rule 1.132

- 1. I am the applicant in patent application Serial No. 10/608,054.
- 2. Attached as Exhibits 1-6 are order catalog pages showing the gift display box that is the subject of the above-identified patent application.
- 3. I have made and/or sold approximately 10,000 gift display boxes mentioned in paragraph 2 since 2003 without any advertising except for my order catalog.
- 4. I believe that U.S. patent protection is necessary to protect my investment in manufacture and sales of the gift display boxes mentioned in paragraph 2.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false

statements may jeopardize the validity of the application or any patent issuing thereon.

Date: 10/15/2005

MICHAEL L.F. CHAN

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TRANSMITTAL	Filing Date	June 27, 2003
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Signature

Name (Print/Type)

Thomas Schneck

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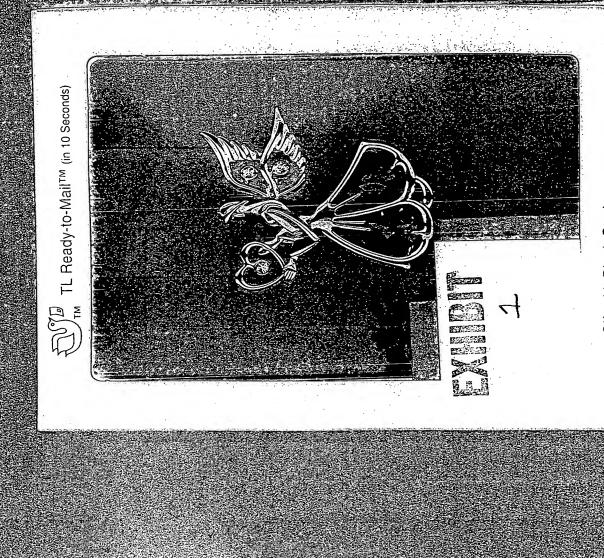
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE respond to a collection of information unless it displays a valid OMB control number Complete if Known Effective on 12/08/2004 Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818) 10/608,054 Application Number FEE TRANSMIT June 27, 2003 Filing Date For FY 2005 Michael L.F. Chan First Named Inventor Bena B. Miller **Examiner Name** Applicant claims small entity status. See 37 CFR 1.27 Art Unit 3725 TOTAL AMOUNT OF PAYMENT (\$) O TRA-007 Attorney Docket No. METHOD OF PAYMENT (check all that apply) Credit Card None Other (please identify): Check Money Order Deposit Account Name: Schneck & Schneck Deposit Account Deposit Account Number: 19-0590 For the above-identified deposit account, the Director is hereby authorized to: (check all that apply) Charge fee(s) indicated below Charge fee(s) indicated below, except for the filing fee Charge any additional fee(s) or underpayments of fee(s) Credit any overpayments under 37 CFR 1.16 and 1.17 WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038. **FEE CALCULATION** 1. BASIC FILING, SEARCH, AND EXAMINATION FEES **EXAMINATION FEES SEARCH FEES FILING FEES Small Entity Small Entity** Small Entity Fee (\$) Fees Paid (\$) Fee (\$) Fee (\$) **Application Type** Fee (\$) Fee (\$) Fee (\$) 200 300 150 500 250 100 Utility 130 65 200 100 100 50 Design 300 160 ደሰ 200 100 150 Plant 500 600 300 300 150 250 Reissue 200 0 0 100 0 0 Provisional **Small Entity** 2. EXCESS CLAIM FEES Fee (\$) Fee (\$) Fee Description Each claim over 20 or, for Reissues, each claim over 20 and more than in the original patent 50 25 Each independent claim over 3 or, for Reissues, each independent claim more than in the original patent 200 100 180 360 Multiple dependent claims **Multiple Dependent Claims** Extra Claims Fee Paid (\$) **Total Claims** Fee (\$) Fee Paid (\$) Fee (\$) 5 0 - 20 or HP = HP = highest number of total claims paid for, if greater than 20 Extra Claims Fee (\$) Fee Paid (\$) Indep. Claims - 3 or HP = U HP = highest number of independent claims paid for, if greater than 3 3. APPLICATION SIZE FEE If the specification and drawings exceed 100 sheets of paper, the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s). Number of each additional 50 or fraction thereof Fee (\$) Fee Paid (\$) Extra Sheets **Total Sheets** / 50 = (round up to a whole number) x - 100 = Fees Paid (\$) 4. OTHER FEE(S) Non-English Specification, \$130 fee (no small entity discount) SUBMITTED BY Registration No. Telephone (408) 297-9733

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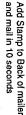
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Date November 22, 2005



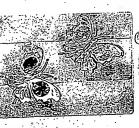
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on Display

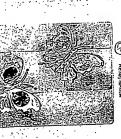
Gift Sets

of mailers in 4 sizes

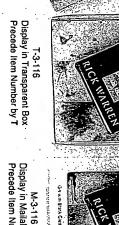
AUL É. LITTLE VISED EDITION

Large 7 1/2 x 5 1/2 x 5/8"

Self Locked Front of Mailer



Medium 6 x 4 3/4 x 1 3/8"



Display in Mailable Box Precede Item Number by M

window at back to close Use cover stored



OF GOD

Design Blank Card 1 Vellum Envelope

Abstract Flower Sap



(4 per title)

vssortment #481

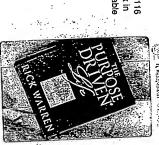
irational Book

assortment of 36 books This Display holds one

В О Х M-3-116 Book in Mailable

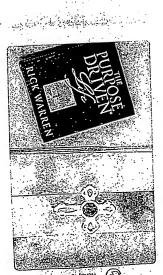
gift sets by assortment order of books or

individually can also be ordered Each book or gift set upon request when Free Display available



Small 6 x 4 3/4 x 3/4"

ounter Display 15"W x 13"D x 10"H



Extra Large 9 x 6 x 1 1/8"

Page 63









































1 Celluloid Pen Card & 1 Vellum Env

Display in Transparent Box

(Precede Item # by T)

with stored cover to close Display in Self Locking Mailer

Parents. 

T-5-GR

M-5-GR

(6 per color) with Free Display

Asst 701 Total 36 Each Celluloid Ball Point Pen

North American Animals

Animals

Asst 704 Total 36 Each 24K Gold Plated Bookmark (4 per style) with Free Display

T-BM390

Ready-to-Mail" in 10 Seconds

is requested) with Free Display

Asst 702 Total 48 Each (12 Mixed Flowers, 12 Mixed Birds, 12 North American

:-15-AS 1 Hand Carved, Hand Painted, Refillable Wood∯en, 1 Card∯t Env

Animals, 12 Mixed Zoo Animals unless specific design on page 32-33





















Asst 705 Total 36 Each

T-W822







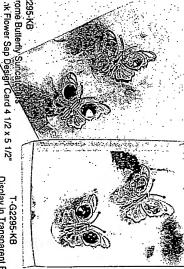


Marine & Miscellaneous unless specific design on Page 49 is requested) T-16-AS 1. Hand Carved, Hand Painted, Wood Bookmark, 1 Card, 1 Env Asst 703 Total 48 Each (12 Mixed Birds, Flowers and Insects, 12 Mixed Animals,



#PCD Cardboard Counter Display 15"W.x.13"D.x.10"H

Page M-501



Display in Transparent Box Display in Mailable Box M-G2295-KB

ellum-Envelope-



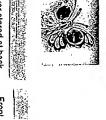
to close window



Slide in cover stored at back







being Front













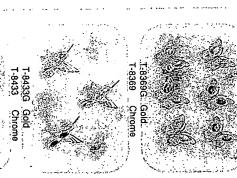












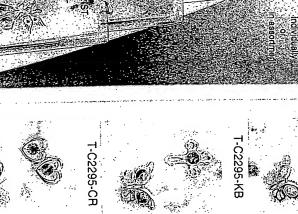
T-C2296-HB

-C2292-CR









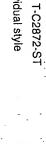
T-C2289-CR

-C2295-HB

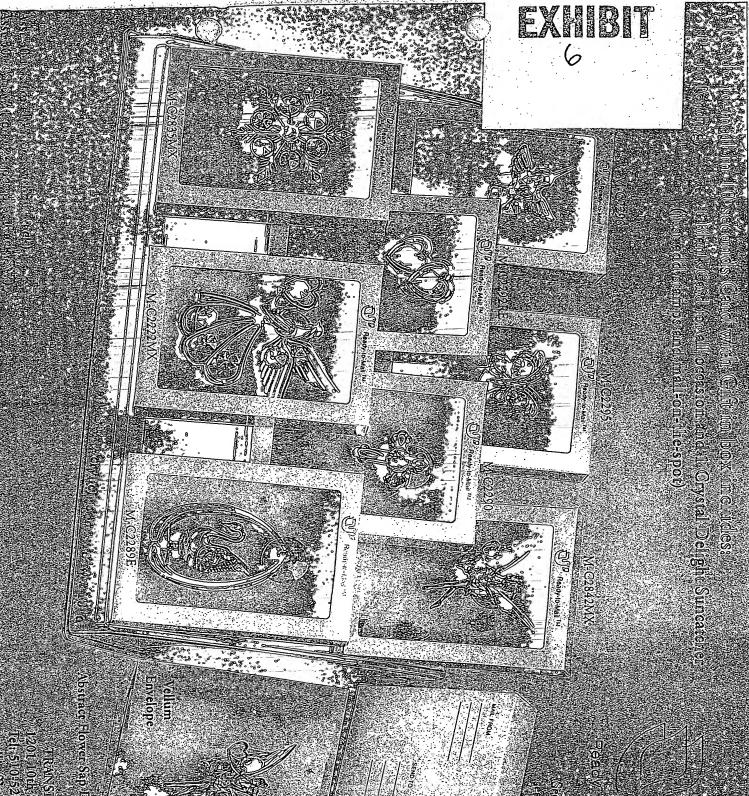
or as Assortment #502 Total 36 Each (4 per style) Chrome Plated Suncatchers, 9 styles, sold by individual style T-C2295-HT











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